

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
August 18, 2009 Session

**STATE OF TENNESSEE V. ROBERT TAYLOR DOWNEY**

**Direct Appeal from the Circuit Court for Montgomery County  
No. 40100305     John H. Gasaway, III, Judge**

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**No. M2009-00158-CCA-R3-CD - Filed September 25, 2009**

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A Montgomery County jury convicted the Defendant, Robert T. Downey, of especially aggravated robbery, conspiracy to commit especially aggravated robbery, aggravated burglary, and reckless endangerment. The Defendant received an effective sentence of twenty-four years in the Tennessee Department of Correction. On appeal, our Supreme Court affirmed the Defendant's convictions, but remanded the case for a new sentencing hearing regarding the propriety of consecutive sentencing. At the resentencing hearing, the trial court again ordered consecutive sentences, imposing an effective sentence of twenty-four years. The Defendant appeals, arguing that the trial court again erred when it ordered consecutive sentencing. After a thorough review of the record and the applicable law, we affirm the trial court's judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Robert T. Bateman, Clarksville, Tennessee, for the Appellant, Robert Taylor Downey.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Lacy Wilber, Assistant Attorney General; John W. Carney, District Attorney General; C. Daniel Brollier Jr., Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

**I. Facts**

On direct appeal, our Supreme Court set forth the following factual summary:

In April 2001, Barbi Michelle Brown, a co-defendant and girlfriend of [the Defendant,] was living with her aunt, Patricia Rye, and the aunt's husband, James Neil Rye. While living with the Ryes, Ms. Brown met the victim, Charlie Rye, who

was James Rye's father.

On the night of April 11, 2001, Ms. Brown approached the [D]efendant about the possibility of robbing the victim. She knew the victim to be a "small, older man" who lived alone and typically carried a lot of cash with him. She described the victim's trailer and how it was laid out. The [D]efendant agreed to participate in the robbery and asked co-defendant Marcus Green to participate as well. The three discussed what they would do if the victim were present or if he were asleep and woke up during the robbery. The [D]efendant suggested that if this happened, they should "knock him out."

Later that night, Ms. Brown drove the [D]efendant and Mr. Green to the victim's residence. Ms. Brown remained in the vehicle while the two men went into the home. The [D]efendant was carrying a red metal flashlight with him. When the men entered the trailer, the victim woke up. The [D]efendant struck him six or seven times in the head with the flashlight. The men left with approximately \$3,200 in cash from the victim's pants, the victim's television, and a large jar full of change. The three divided the cash, Mr. Green kept the jar of change, and the [D]efendant kept the television, which he later sold.

The next morning, Mr. James Rye drove past the victim's home and noticed that the door was open and that the victim's truck was still there. Mr. Rye found this unusual because his father should have been at work. He entered the home and found the victim on his bed beaten, bleeding, and incoherent. The victim's pants and wallet were on the end of the bed. Mr. Rye noticed blood all over the victim and the wall. The victim's head had been severely beaten, his eyes were swollen shut, and there was blood in his mouth. As a result of his injuries, the victim was hospitalized for over a month. According to one of his attending physicians, his skull injuries were potentially life-threatening.

*State v. Downey*, 259 S.W.3d at 729-30 (Tenn. 2008). The Defendant was convicted after a jury trial of conspiracy to commit especially aggravated robbery, especially aggravated robbery, aggravated burglary, and reckless endangerment.

The trial court sentenced the Defendant as a Range I standard offender to twenty years for the especially aggravated robbery conviction, eight years for the conspiracy to commit especially aggravated robbery conviction, three years for the aggravated burglary conviction, and one year for the reckless endangerment conviction. The trial court ordered the eight-year sentence to be served concurrently with the twenty-year sentence, the three-year sentence to run consecutively to the twenty-year sentence, and the one-year sentence to run consecutively to the three-year sentence for an effective sentence of twenty-four years.

On direct appeal, this Court concluded the trial court failed to support its imposition of consecutive sentencing based on the necessary findings announced in *State v. Wilkerson*, 905 S.W.2d 933, 936 (Tenn. 1995). *State v. Downey*, No. M2005-02335-CCA-R3-CD, 2007 WL 465125 (Tenn. Crim. App., at Nashville, Aug. 8, 2006). This Court affirmed the Defendant's convictions but remanded to the trial court for a new hearing on the issue of consecutive sentencing. *Id.*

After consideration of the issues raised, our Supreme Court affirmed the convictions and, because neither party challenged this Court's decision to remand on the sentencing issue, remanded to the trial court for resentencing under this Court's order. *See State v. Downey*, 259 S.W.3d 723 (Tenn. 2008).

On remand, the trial court held a new sentencing hearing and specifically addressed the *Wilkerson* factors. The trial court again imposed consecutive sentencing for an effective sentence of twenty-four years. It is from this judgment that the Defendant now appeals.

## **II. Analysis**

On appeal, the Defendant claims that the trial court erred when it imposed consecutive sentences, arguing that the record does not establish a statutory basis for the imposition of consecutive sentencing. The State argues that the trial court correctly imposed consecutive sentences because the sentence was reasonably related to the severity of the crime and necessary to protect the public.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts (2006). This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the Sentencing Act, the appellate court may not disturb the sentence even if a different result was preferred. Tenn. Code Ann. § 40-35-103 (2006); *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

A trial court may impose consecutive sentences if the state proves by a preponderance of the evidence that the offender meets at least one of the criteria listed in the consecutive sentencing statute. T.C.A. § 40-35-115 (2006). In the case under submission, the trial court found criteria (4), that the Defendant was a "dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." *Id.*

The trial court's finding that the Defendant is a "dangerous offender" by itself is insufficient to support consecutive sentences. In *State v. Wilkerson*, 905 S.W.2d 933 (Tenn.1995), our Supreme Court set forth additional requirements for consecutive sentences when the defendant is a "dangerous offender." Accordingly, in order to base consecutive sentencing on the dangerous offender category, the trial court must find: (1) that the term imposed "is necessary to protect the public from further criminal acts by the offender;" and (2) "that the terms imposed are reasonably related to the severity of the offenses committed." *Id.* at 938. The requirement of additional findings when the defendant is a "dangerous offender" "arises from the fact that of all of the categories for consecutive sentencing, the dangerous offender category is the most subjective and hardest to apply." *State v. Lane*, 3 S.W.3d 456, 461 (Tenn.1999). The other categories for consecutive sentencing have "self-contained limits;" thus, the additional findings are limited to cases involving consecutive sentencing of "dangerous offenders." *Id.*

In this case, the trial court found that consecutive sentencing was reasonably related to the severity of the crime and necessary to protect the public from further criminal conduct by the Defendant. After a recitation of the facts in this case, the trial court stated:

The Court does believe and find that notwithstanding Mr. Downey's expression of remorse, given the severity of this crime, Mr. Downey's complete disregard for the life of Mr. Rye that these sentences of three years and one year are properly to be served consecutively because of the necessity to protect the public from Mr. Downey, and the terms, three years and one year, are reasonably related to the severity of the offenses.

Our review of the record reveals that the evidence does not preponderate against the trial court's findings in this regard. The Defendant agreed to perpetrate a crime on a "small, older man" who lived alone. The Defendant suggested they "knock out" the victim if the victim was present or woke up during the burglary. Moreover, the Defendant came prepared to "knock out" the victim with a metal flashlight. The victim indeed woke up when the perpetrators entered his home, and the Defendant, as planned, beat the victim repeatedly with the flashlight and robbed him. The victim was discovered the following morning with his eyes swollen shut, blood in his mouth, and the skin on his face so bruised that it was impossible to distinguish his skin color or his facial features. The injuries sustained by the victim were "life-threatening," resulting in a month-long stay in the hospital, for part of which the victim was in a coma. This evidence supports the trial court's imposition of consecutive sentencing. The Defendant is not entitled to relief on this issue.

### **III. Conclusion**

After a thorough review of the record and the applicable law, we conclude that the trial court adhered to proper statutory sentencing procedures and duly weighed and considered all appropriate factors when it imposed consecutive sentencing. As such, we affirm the trial court's judgment.

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ROBERT W. WEDEMEYER, JUDGE